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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 411

THE GALVESTON WHARF COMPANY ET AL.,
PETITIONERS,

vs.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND BRIEF IN SUPPORT THEREOF.

ALEX F. WEISBERG,
Counsel for Petitioners.

THOMPSON, KNIGHT, BAKER & HARRIS,
GEORGE S. WRIGHT,
Of Counsel.

(36,225)

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

MAY IT PLEASE THE COURT:

The petition of the Galveston Wharf Company respectfully shows to this honorable court:

A.

Summary Statement of the Matter Involved.

The American Grocery Company and others sued the Mallory Steamship Company, the Galveston Wharf Company, and the Galveston, Harrisburg & San Antonio Railway Company in the State District Court at El Paso, Texas, to recover approximately

$6,000.00 on account of the loss at Galveston, Texas, on January 13, 1926, of a carload shipment of sardines by reason of a fire that occurred at Galveston, Texas, on that date. Plaintiffs' cause of action was based on a bill of lading prescribed by the Interstate Commerce Commission and covering an interstate shipment from the State of Maine to El Paso, Texas. The bill of lading called for the transportation of the shipment from a point in Maine to the City of New York over the Boston & Maine Railway Company and by water from the Port of New York to the Port of Galveston, Texas, by the Mallory Steamship Company and from Galveston, Texas, to the interior point, El Paso, by the G. H. & S. A. Railway Company. The bill of lading named the Boston & Maine Railway Company as initial carrier and the Mallory Steamship Company and G. H. & S. A. Railway Company. The Galveston Wharf Company was not a party to the bill of lading, and the undisputed evidence showed that it was not a party to the tariff covering the shipment and did not receive any part of the freight. The Boston & Maine Railway Company delivered the shipment to the Mallory Steamship Company at New York, and the Mallory Steamship Company transported the shipment in the Steamship "Concho," which arrived at Galveston on the morning of January 13, 1926 (Ex. I., R. 80A).

At Galveston the Mallory Steamship Company leased from the Galveston Wharf Company certain piers which the Mallory Steamship Company used in its freight business. Pier No. 24 was used as the pier on which the Mallory Steamship Company unloaded

inbound shipments coming to Galveston. Other piers were used by the Mallory Steamship Company for the loading of outbound shipments. In the lease contract between the Mallory Steamship Company and the Galveston Wharf Company was a provision to the effect that the Galveston Wharf Company should not be liable for any shipments passing through the piers leased by the Mallory Steamship Company (R. 81).

At the time in question the G., H. & S. A. Railway Company, named in the bill of lading as delivering carrier, had no tracks which connected with the unloading depot of the Mallory Steamship Company, the terminal carrier named in the bill of lading. The Galveston Wharf Company had tracks which made connection with the G., H. & S. A. Railway line at a point removed from Pier 24. The Wharf Company filed tariffs with the Interstate Commerce Commission which fixed a charge for the two services to be rendered the carriers, in two respects: First, the Wharf Company would check with the clerk of the Mallory Steamship Company the shipments and would pick up such shipments from Pier 24 destined to inland points in Texas, truck these shipments to cars adjacent to Pier 24, and load the shipments into the cars; second, switch the cars to the respective rail carriers named in the bills of lading (R. 57-59).

These tariffs, which were furnished to both the G., H. & S. A. Railway Company and the Mallory Steamship Company, provided that the Galveston Wharf Company should not be liable for loss and damage occurring to freight on the lines of the company, except for negligence. Under the undisputed evidence the

Wharf Company, under the custom and course of dealing on shipments coming by the Mallory Steamship Line to Galveston, such as the shipment involved here, would pick up the shipment from Pier 24, check the shipment with the clerk of the Mallory Line, and issue a receipt as of the day and hour it picked up the shipment from Pier 24 (R. 60-61) (Ex. D, R. 86D, Sec. C).

During the day of January 13, 1926, the Mallory Steamship Company unloaded a very large number of shipments from the Steamship "Concho" and placed them on Pier 24. Among these was the shipment of the American Grocery Company. During that day the Galveston Wharf Company picked up from Pier 24 sixty-six cars of freight which had been unloaded by the Mallory Steamship Company from the "Concho" and placed these sixty-six cars of merchandise in cars of the various railroads, but at 7:00 o'clock on the evening of January 13, 1926, when the Wharf Company closed its operations for the day, the shipment involved in this suit, with other shipments, was still on the platform at Pier 24, where it had been placed by the Mallory Steamship Company and where it was destroyed by fire on the night of January 13, 1926. If the fire had not occurred on the night of January 13, 1926, in the ordinary course of business on January 14th the Wharf Company would have checked this shipment with the clerk of the Mallory Steamship Company, picked up the shipment, placed it on trucks, and in due course would have issued a receipt to the Mallory Steamship Company as of the date and hour of the picking up of the shipment (R. 58-61).

On January 13th this shipment needed recoopering because of some damaged packages. The Mallory Steamship Company had recoopered the shipment and a representative of the delivering rail line, the G., H. & S. A., had O.K'd the recoopering under the existing custom, but the Galveston Wharf Company had no notice that the recoopering had been done and that it had been O.K'd by the railway line's representative and would not have known this until, in the ordinary course of business, on the following day, the day after the fire, when it would have proceeded to pick up the shipment from the pier.

At the time of the fire, the undisputed evidence showed the following:

1. The merchandise had not been checked by the joint representatives of the Wharf Company and the Steamship Company (R. 76) in accordance with the general custom in handling such shipments.

2. Under the mode of dealing between the parties the period had not been reached when it was the duty of the Wharf Company to issue a receipt for the goods to the Steamship Company (R. 45-46, 61-62).

3. After the damaged part of the shipment had been repaired by the Steamship Company, the Wharf Company was not afforded a fair opportunity, in the due and ordinary course of its business, to possess the goods.

4. The Steamship Company, by failure to give the Wharf Company notice that the damaged portion of the shipment had been repaired, impliedly agreed that

such notice might be acquired by the Wharf Company in due course of its business (R. 78-79).

5. The Steamship Company claimed the right, upon proper order, to divert the shipment at any time prior to the actual loading by the Wharf Company into the cars of the railway company (R. 47).

6. The goods were cared for and policed by the agents of the Steamship Company up to the time they were destroyed by fire.

7. The Steamship Company and the Wharf Company interpreted the mutual understanding existing between them as placing possession of the goods with the Steamship Company at the time of the fire, as the latter company, without protest from the former, assumed to and did handle on its own account the salvage of the goods which went through the fire (R. 76-77).

Upon the trial of the case in the State trial court all parties abandoned any claim of negligence against any of the defendants.

B.

Decisions of Courts Below.

The trial court rendered judgment in favor of the plaintiffs, the shippers, against the Galveston Wharf Company, holding, first, that at the time of the fire possession of the shipment had passed from the Mallory Steamship Company to the Galveston Wharf Company; second, that the Galveston Wharf Company

held the shipment as a carrier and was liable for its loss and damage by fire as an insurer, even though it was not guilty of negligence.

The case was appealed to the Court of Civil Appeals, an intermediate Texas appellate court, at El Paso, Texas, and that court held that at the time of the fire possession of the shipment had passed from the Mallory Steamship Company to the Galveston Wharf Company, but that the Galveston Wharf Company was not a party to the bill of lading, and it held the shipment merely as the agent of the G., H. & S. A. Railway Company and was not liable except for negligence, and as no negligence was shown, the court reversed the judgment of the trial court (R. 88).

By application for writ of error the case was taken to the Supreme Court of Texas, where several opinions were written through the Commission of Appeals, a court created for the purpose of assisting the Supreme Court in disposing of its docket. The first opinion rendered by the Commission of Appeals, by Justice Ryan, held that possession of the shipment had passed from the Mallory Steamship Company to the Galveston Wharf Company and that the Galveston Wharf Company was liable because of negligence.

A motion for rehearing was filed calling the court's attention to the fact that there were no claims of negligence in the case (R. 128-132).

This motion was granted and the case was then placed on the docket of the Supreme Court of Texas, and on the 18th day of March, 1931, the Supreme Court of Texas rendered its opinion and judgment, holding, first, that at the time of the fire possession of

the shipment had passed from the Mallory Steamship Line to the Galveston Wharf Company; and, second, that the Galveston Wharf Company held the shipment with a liability of connecting carrier—that is, an insurer, and was liable for the loss and damage to the shipment, even though it was not guilty of negligence.

The opinion of the Supreme Court is not yet officially reported but is found on page 145 of the Transcript of Record.

Thereupon the Galveston Wharf Company, American Grocery Company and the other plaintiffs in the trial court, filed motions for rehearing. These motions were overruled by the Supreme Court of Texas on the 24th day of June, 1931 (R. 162).

C.

Reasons Relied Upon for Allowance of the Writ.

I.

The Supreme Court of Texas recognized in its opinion that the question as to whether the possession of the shipment at the time of the fire had passed from the Mallory Steamship Company to the Galveston Wharf Company, and the question as to whether the Galveston Wharf Company, if it had possession of the shipment, was liable as an insurer, were federal questions to be controlled by the decisions of the United States Supreme Court.

In the case of *Southern Ry. Co. vs. Prescott,* 240 U. S. 632, it was held that the question of burden of proof in a suit involving an interstate shipment was a federal question to be controlled by federal decisions.

In the case of *Georgia, Florida & Alabama Ry. Co. vs. Bliss Milling Co.*, 241 U. S. 190, this honorable court held that on a shipment under an interstate bill of lading a question of misdelivery by a terminal carrier was a federal question to be determined by federal decisions.

In the case of *Mo., Pac. Ry. Co. vs. Reynolds-Davis Co.*, decided by this honorable court, 268 U. S. 366, this court granted a writ of certiorari to the Supreme Court of the State of Arkansas on the ground that the question as to whether the switching carrier was a connecting carrier and performed a service as such raised a federal question.

II.

The decision of the Supreme Court of Texas is in conflict with the decision of the United States Supreme Court in the case of *Missouri Pacific Ry. Co. vs. Reynolds-Davis Co.*, 268 U. S. 366, in that the Supreme Court of Texas held in its decision that the Galveston Wharf Company, which was not a party to the bill of lading nor the tariffs of the carriers named in the bill of lading, and who was employed by one of the carriers named in the bill of lading to perform a switching service for it, was liable as a connecting carrier; while the Supreme Court of the United States in the Reynolds-Davis Company case held that a carrier employed by another carrier named in the bill of lading was not a connecting carrier, but merely an agent of the carrier named in the bill of lading.

III.

The decision of the Supreme Court of Texas to the effect that the Galveston Wharf Company was liable as a connecting carrier and insurer is in conflict with the decisions of the Supreme Court of the United States in the case of *Boston & Maine Ry. Co. vs. Hooker*, 233 U. S. 97; *Cau vs. Texas & Pacific Ry. Co.*, 194 U. S. 427; *Arthur vs. Texas & Pacific Ry. Co.*, 204 U. S. 506; *M., K. & T. Ry. Co. vs. Harriman*, 227 U. S. 657, which cases hold that tariffs of a carrier filed with the Interstate Commerce Commission become a part of the contract with it and that a contract for service is sufficient consideration for a limitation of a carrier's liability, the Supreme Court of Texas in its opinion holding that notwithstanding the limitation of liability, except for negligence, in the tariffs filed by the Galveston Wharf Company, that the Galveston Wharf Company was liable as an insurer.

IV.

The holding of the Supreme Court of Texas to the effect that at the time of the fire the possession of the shipment in question had passed from the Mallory Steamship Company to the Galveston Wharf Company is in conflict with the holdings of this honorable Supreme Court in the case of *Pratt vs. Grand Trunk Railway Co.*, 95 U. S. 43, and the case of *Clayton vs. Texas & Pacific Railway Company*, 173 U. S. 346, in that the Supreme Court of Texas held that notwithstanding the fact that the undisputed evidence showed

that under the customary course of dealing this shipment was to have been checked by the clerks of the Mallory Steamship Company and the Galveston Wharf Company before possession passed to the Wharf Company and that such checking had not taken place, possession had passed from the Mallory Steamship Company to the Wharf Company; whereas, the Supreme Court of the United States in such cases held in substance that the possession of such a shipment would not pass under such circumstances until such check was made.

V.

The holding of the Supreme Court of Texas to the effect that the Galveston Wharf Company, notwithstanding the provisions of its tariffs limiting its liability to its negligence was liable as a carrier or insurer, is in conflict with the principal decisions of this honorable Court to the effect that such a limitation of liability in the tariff is valid.

D.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this honorable Court to the Supreme Court of Texas, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings of the cause numbered and entitled on the Docket No. 27467, Galveston Wharf Company *vs.* American Grocery Com-

pany *et al.*, and that said decree and judgment of the Supreme Court of Texas may be reversed by this honorable Court, and that your petitioners may have such other and further relief in the premises as to this honorable Court may seem meet and just.

Respectfully submitted,

GALVESTON WHARF COMPANY,
By ALEX F. WEISBERG,
Counsel for Petitioners.

THOMPSON, KNIGHT, BAKER & HARRIS,
GEO. S. WRIGHT,
Of Counsel.

E.

The American Grocery Company adopts the foregoing petition and the Galveston Wharf Company joins in the prayer for writ of certiorari to the Supreme Court of Texas.

AMERICAN GROCERY CO.,
By FRYER & CUNNINGHAM,
Counsel for American Grocery Company.

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OCTOBER TERM, 1931

No. 411

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vs.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the Supreme Court of Texas has not been officially reported at the time of the filing of this brief, but the decision of the Supreme Court of Texas rendered on March 18, 1931, by that court may be readily found in the official reports when they are issued, and is found on pages 145 to 160 of the Transcript of the Record.

II.

Jurisdiction.

1. By the Acts of the Federal Congress known as the Interstate Commerce Act, the Federal Government has taken charge of the field of interstate commerce, and under this Interstate Commerce Act all questions of liability of carriers under interstate bills of lading are governed and controlled by the Federal decisions.

2. In the Supreme Court of the State of Texas the Galveston Wharf Company, American Grocery Company et al., plaintiffs in the trial court, filed motions for rehearings in due season on the 2d day of April, 1931 (R. 161). Each of these motions was overruled by the Supreme Court of Texas on June 24, 1931 (R. 162).

3. The Supreme Court of Texas in its opinion recognized that the Galveston Wharf Company and the American Grocery Company had raised a federal question to be controlled by the decisions of the Federal Courts (R. 152).

In the motions for rehearing filed by Galveston Wharf Company and American Grocery Company federal questions involved were raised (R. 161).

That the questions involved in this case were federal questions to be determined by the Federal decisions was also raised by the Galveston Wharf Company and American Grocery Company et al. in the assignments of error filed in the motions for rehearings filed March

27, 1930, and complaining of the first decision of the Supreme Court of Texas, which was later set aside (R. 128-132).

The Supreme Court of Texas held that under the Federal decisions (1) the possession of the shipment in question at the time of the fire had passed from the Mallory Steamship Company to the Galveston Wharf Company; (2) that notwithstanding the fact that the Galveston Wharf Company had merely contracted with one of the carriers in a bill of lading to load the shipment and switch the cars that said Galveston Wharf Company was liable for the shipment as a carrier or insurer; and (3) that notwithstanding the provisions of the tariffs of the Galveston Wharf Company filed with the Interstate Commerce Commission and delivered to the respective carriers named in the bill of lading to the effect that the Wharf Company should not be liable except for its negligence, the Galveston Wharf Company was liable as a carrier or insurer.

4. In the case of *Southern Railway Company vs. Prescott,* 240 U. S. 632, it is held that the question of burden of proof in a suit against the Railway Company on an interstate shipment was a Federal question to be controlled by the Federal Decisions.

In the case of *Georgia, Florida & Alabama Railway Company vs. Blish Milling Company,* 241 U. S. 190, the court held that under an interstate bill of lading the question of a misdelivery of the terminal carrier was a Federal question to be determined by the Federal Decisions.

In the case of *Missouri Pacific Railway vs. Reynolds-Davis Company,* 268 U. S. 366, this Honorable Court

granted a writ of certiorari to the Supreme Court of the State of Arkansas on the ground that the question as to whether the switching carrier was a connecting carrier and performed a service as such raised a Federal question.

III.

Statement of the Case.

A full statement of the case has been given under heading A in the petition and in the interest of brevity the statement is not repeated at this point.

IV.

Specifications of Error.

1. The Supreme Court of Texas erred in finding and holding that the possession of the shipment at the time of the fire had passed from the Mallory Steamship Company to the Galveston Wharf Company.

2. The Supreme Court of Texas erred in finding and holding that Galveston Wharf Company held the possession of the shipment at the time of the fire as a connecting carrier and not as an agent of the carrier named in the bill of lading.

3. The Supreme Court of Texas erred in finding and holding that at the time of the fire the Galveston Wharf Company was liable as insurer of the shipment in question when the provisions of the tariff of the Galveston Wharf Company, filed with the Interstate Commerce Commission and delivered to the carriers

named in the bill of lading, provided that the Galveston Wharf Company should not be liable except for its negligence.

V.

ARGUMENT.

Point One.

The Supreme Court of Texas, in its final opinion rendered in this case, cites as disputed evidence facts which in our judgment conclusively show that at the time of the damage to the shipment by fire on January 13, 1926, said shipment was in the possession of the Mallory Steamship Company and not in the possession of the Galveston Wharf Company. At page 152 of the Transcript of the Record the Supreme Court of Texas, in its opinion, says:

> "Let us briefly review the facts upon this issue:
>
> "Mr. Gossreau, General Manager for the Wharf Company, testified:
>
> "'At the time the fire occurred on January 13th, the Galveston Wharf Company absolutely had done nothing to take possession of the shipment of sardines. They had not handled it in any way. At the time of the fire they had not begun to start the service they were going to be paid for by the G., H. & S. A.' (R. 152, 153).
>
> "The tariffs introduced show wharf tariffs chargeable to the Steamship Company and loading and switching charges chargeable to the

railroad carrier. Mr. Gossreau further testified:

"'Outside of the $5,000 a year the Mallory Steamship Company pays us for the rental of Pier No. 24 and others. We receive compensation for one service from the Bay Lines, and we receive compensation for another service from the Mallory.'

"He further testified:

"'As to the understanding at the time of this fire as to when the Galveston Wharf Company took possession, the general understanding was that the shipments are taken possession of when they are lifted from the floor of the pier and deposited in the cars by the Galveston Wharf Company's forces for account of the Galveston Bay Lines.

"'The local freight is held on the pier and delivery is made to the consignees by the Mallory Line's forces from these same piers. That is the only place where they transact their business of receiving freight and discharging freight, on these piers that they rent from us.

"'At the time this fire occurred on January 13, 1926, the Mallory Line was exclusively using Pier No. 24 (R. 153).

"'It contains also wharfage charges covering freight passing over piers, which charge is assessed against the vessel or its owners.'

"Albert J. Schulte, Chief Dock Clerk and witness for the Steamship Company, testified that—

"'It is a fact that the Wharf Company's clerks enter a record of these shipments in that

billing on the books, just like the Mallory Line. * * * after they do that on carload lots, whenever the Galveston Wharf Company gets ready to pick up a carload lot at Pier No. 24, and put it on a car, they take a copy of the billing, accompanied by a clerk of the Mallory, and check those carload lots as they pick them up and take them over to the car.'

"The Steamship Company claimed the right, under proper orders, to divert the shipment at any time prior to the actual loading by the Wharf Company into the cars of the Railway Company (R. 154).

"Mr. Bertram, a witness for the Steamship Company, stated that—

" 'If we had been confronted with a diversion or reconsignment of that shipment of sardines to some dealer in Greenville, Texas, if the American Grocery Company had filed a diversion or reconsignment, we would have endeavored to have a diversion. We would have reconsigned it for the accommodation of the consignee. After the goods had actually been loaded in the cars and we had received the diversion or reconsignment order, the shipment would have been beyond our control.'

"The contract between the Wharf Company and the Steamship Company leasing to the latter the pier in question, provided that such pier would be leased by it and the evidence shows that on the night in question, at the time of the fire, this shipment of goods was being policed by the Steamship Company. It is undisputed that no part of the shipment had been loaded on the cars of the Railway Company (R. 154).

"Another cogent reason why the shipment of goods had not been delivered to the Railway Company is reflected in the fact, as shown by the uncontroverted evidence, that after the fire whatever remained of the cargo was salvaged by the Steamship Company" (R. 154).

On page 156 of the Transcript of the Record the Supreme Court of the State of Texas says:

"It is undisputed that the Steamship Company and leased certain piers from the Wharf Company for the purpose of unloading its freight; that the Wharf Company handled its cargoes and loaded it on the cars of the various railroad lines and then switched them from the Wharf Company to the railroad line receiving same. The testimony shows that if the Steamship Company should desire to divert the shipment before delivery to the railroad that it is authorized to do so. The trial court held that the delivery had not been made to the railroad and the testimony shows that it had not issued a receipt therefor. It is also shown that no part of this shipment had been loaded on the cars of the railroad. The General Manager for the Wharf Company testified that at the time of the fire it had done nothing to take possession of the shipment of sardines. At the time of the fire they had not begun to start the services they were going to be paid for by the railroad, and he further testified that the general understanding was that the shipments are taken possession of when they are lifted from the floor of the pier and deposited in the cars by the Wharf Company's forces for account of the Galveston Bay Lines."

We realize if there was a dispute in the evidence as to whether there had been a delivery of this shipment from the Mallory Steamship Company to the Galveston Wharf Company the finding of the State court would be conclusive upon such question of fact, but we respectfully submit that the undisputed evidence shows as a matter of law that this shipment at the time of the fire had not passed from the Mallory Steamship Company to the Galveston Wharf Company. This undisputed evidence shows that when a steamship came into Galveston over the Mallory Steamship Company the forces of the Mallory Steamship Company would unload the cargo from this ship into Pier 24, its unloading depot. If any parts of said cargo were damaged and needed to be recoopered or repaired the employees of the Mallory Steamship Company would repair or recooper such shipments (R. 52).

The Galveston Wharf Company had filed with the Interstate Commerce Commission the tariff which provided for a certain charge known as a loading charge, for which the Galveston Wharf Company agreed in the ordinary course of its business to pick up these shipments from Pier 24 and truck them to the railroad cars of the respective carrier named in the bill of lading standing on tracks of the Galveston Wharf Company opposite Pier 24 (R. 60-62). For this service the G. H. & S. A. Railway Company would pay the Galveston Wharf Company.

The same tariffs provided for a switching charge, which covered the service of the Galveston Wharf Company in switching the cars after the shipments had been put into them from the tracks adjacent to Pier

24 to the connecting line of the G., H. & S. A. This switching service, had it been performed, would have been paid for by the G., H. & S. A. Railway Company.

Before the Galveston Wharf Company would pick up the shipment from Pier 24 and truck it to the cars adjacent to Pier 24 a clerk of the Galveston Wharf Company and a clerk of the Mallory Steamship Company would check the shipment on the floor and thereafter, in due course, the Galveston Wharf Company would deliver to the Mallory Steamship Company a receipt for the goods picked up, which would always bear the date as of the time that the shipment was picked up from Pier 24. While this receipt might not be delivered to the Mallory Steamship Company until several days after the shipment was picked up the date it bore was always the date that the shipment was picked up from Pier 24 (R. 58-62).

The undisputed evidence shows that at the time the fire occurred there had been no check of the shipment involved in this case by the clerks of the Mallory Line and the clerks of Galveston Wharf Company (R. 76).

Under the custom of dealing between the parties the time had not been reached when it was the duty of the Galveston Wharf Company to pick up the shipment or to issue receipt for the goods to the Steamship Company (R. 76).

The shipment involved in this case was damaged and had to be repaired or recoopered by the steamship company. After it had been repaired and recoopered the Wharf Company was not notified that the shipment was ready to go, that the recoopering had been done and would not have known of this fact until the

following day when, in the ordinary course of business, it would have picked the shipment up from Pier 24.

The Steamship Company, by its failure to give the Wharf Company notice that the damaged portion of the shipment had been repaired, impliedly agreed that such notice might be acquired by the Wharf Company in the due course of its business.

The Steamship Company claimed the right upon proper order to divert the shipment at any time prior to the actual loading by the Wharf Company into the cars of the Railway Company, thus retaining dominion and control over the shipment which was damaged prior to the time when the Wharf Company was to pick it up.

The shipment involved was cared for and policed by the agents of the Steamship Company up to the time that it was destroyed by fire, which showed an exercise of dominion and control over this shipment by the Steamship Company at the time the fire occurred.

The Steamship Company and the Wharf Company interpreted the mutual understanding existing between them as placing possession of the goods with the Steamship Company at the time of the fire when the latter company, without protest from the former, assumed to and did handle on its own account the salvage of the goods which were damaged by the fire.

In the *Clayton Case,* decided by this Honorable Court, 173 U. S. 346, shipment was delivered in Texas to a railway company to be carried to Liverpool, England. The bill of lading provided that the carrier alone in whose actual custody the goods should be at the

time of their loss should be liable therefor. The loss occurred before the goods had been actually delivered to the said carrier, although they were placed by the Company on the wharf where the steamship company, the next connecting carrier, usually received goods and notice was given by the railway company to the steamship company. The railway company had requested the steamship company to remove the goods but the steamship company had not done so. The time of taking the goods from the wharf was entirely within the control of the steamship company. While the goods were located in the designated place on the wharf they were destroyed by fire. Notwithstanding these facts this Honorable Court held that at the time the fire occurred the shipment involved in the Clayton Case was not in the actual custody of the steamship company.

In the case at bar the Galveston Wharf Company had received no notice from the Mallory Steamship Company that the shipment was ready to be picked up. If the fire had not occurred on the night of January 13, 1926, in the ordinary course of business of the following day the clerk of the Galveston Wharf Company and the clerk of the Mallory Steamship Company would have checked the shipment involved and upon the information of this check the Galveston Wharf Company would have in the ordinary course of business delivered a receipt to the Mallory Steamship Company as of the time of the picking up of the shipment, viz., the 14th day of January, 1926. If at the time of the fire, under the undisputed evidence the Mallory Steamship Company had received the order to divert this

shipment it would have been diverted by it without consulting the Galveston Wharf Company. After the Galvestor Wharf Company had finished work for the day of January 13, 1926, during that night this shipment was destroyed by fire while in Pier 24, leased by the Mallory Steamship Company, and it was watched and policed by the employees of the Mallory Steamship Company. The day after the fire occurred the Mallory Steamship Company, recognizing the fact that it had possession of this shipment at the time of the fire, took charge of the salvage and sold it without consulting the Galveston Wharf Company. We respectfully submit that at the time the fire occurred possession of the shipment involved in this case had not passed from the Mallory Steamship Company to the Galveston Wharf Company, as shown by the undisputed evidence.

Point Two.

The holding of the Supreme Court of Texas to the effect that at the time of this fire the Galveston Wharf Company held the shipment as a connecting carrier is, we respectfully submit, in direct conflict with the holding of this Honorable Court in the case of *Missouri Pacific Railway Company vs. Reynolds-Davis Grocery Co.*, 268 U. S. 366, decided May 25, 1925, by Justice Brandeis. In that case suit was brought in the State court of Arkansas against the Missouri Pacific Railroad to recover the loss of a carload of sugar shipped from a point in Louisiana to Ft. Smith, Arkansas, on a through bill of lading. The loss occurred in the City of Ft. Smith while the car was in the possession of the St. Louis & San Francisco Railroad, which had

been employed by the Missouri Pacific to switch the car from a point on its line within the city to the consignee's warehouse, which lay within the city on the lines of the switching carrier. The Missouri Pacific requested the trial court to rule that as the bill of lading provided that no connecting carrier should be liable for any damage which did not occur on its own line and delivery at the consignee's warehouse was part of an interstate shipment, the defendant was not liable because it was neither the initial or delivering carrier. The court refused to rule as requested. The jury found for the plaintiff and the judgment entered on the verdict was confirmed by the Supreme Court of Arkansas. This Honorable Court, speaking through Justice Brandeis, said:

> "This Court granted a writ of certiorari (68 L. Ed. 1188). The joint through rate covered delivery at the warehouse of the consignee. The Bill of Lading named Morgan's Louisiana & Texas Railroad & Steamship Company as initial carrier and the route designated therein named the Missouri Pacific as the last of the connecting carriers. Its lines enter Fort Smith but do not extend to the consignee's warehouse. *It employed the St. Louis & San Francisco to perform the necessary switching service and then paid therefor* $6.30, *the charge fixed by the tariff on file with the Interstate Commerce Commission. The switching carrier was not named in the Bill of Lading and did not receive any part of the joint through rate. It was simply the agent of the Missouri Pacific for the purpose of delivery. The Missouri Pacific was the delivering carrier and is liable as such.*"

Point Three.

If at the time of the fire the shipment involved in this case was in possession of the Galveston Wharf Company, the provisions of its tariff filed with the Interstate Commerce Commission were a part of the contract between the Galveston Wharf Company and the carriers named in the bill of lading. The provision of such tariff to the effect that the Wharf Company should not be liable for damage to the shipment except for its negligence is valid and as all claims of negligence were abandoned the Wharf Company was not liable for the loss to the shipment involved. Neither the Mallory Steamship Company, named in the bill of lading as an intermediate carrier, nor the G., H. & S. A. Railway Company, named in the bill of lading as the delivering carrier, was required to use the services of the Galveston Wharf Company in transferring shipments from the Mallory Steamship Company's docks to the cars of the G., H. & S. A. Railway Company. They could have made arrangements for motor trucks or some other means of transportation to transfer such shipments. The shipper named in the bill of lading made a contract with the Mallory Steamship Company and the G., H. & S. A. Railway Company under the terms of which those carriers agreed to transport his property from New York to El Paso, Texas. The shipper did not make any contract with the Galveston Wharf Company. The Galveston Wharf Company filed with the Interstate Commerce Commission tariffs covering certain services it was willing to render to the Mallory Steamship Company and the

G., H. & S. A. Railway Company at Galveston. This tariff contained the following provision:

> "Under rates named in Items 42, 48 and 50, the railroad company from which is received or to which freight is delivered shall be liable for loss and damage occurring to freight on lines of this company other than through the negligence of this company."

These tariffs were furnished to the Mallory Steamship Company and the G., H. & S. A. Railway Company prior to the shipment involved in this case. When the carrier named in the bill of lading involved in this case employed the Galveston Wharf Company to render the loading and switching service on this shipment such employment was under this tariff, and such tariff provision became a part of the contract for such service.

In the case of *Boston & Maine R. R. vs. Hooker*, 233 U. S. 97, this Honorable Court held that a regulation contained in the published tariff of an interstate railway carrier on file with the Interstate Commerce Commission limiting its baggage liability to one hundred dollars unless a greater value is declared and stipulated by the owner and an excess charge is paid, is binding upon the passenger in case of loss of the baggage through the carrier's negligence, regardless of the passenger's lack of knowledge of or assent to such regulation and regardless of the carrier's failure to inquire as to the value of the baggage; and in the case of *M., K. & T. vs. Harriman*, 227 U. S. 669, this Honorable Court said that the shipper was compelled

to take notice of the rate sheets contained in tariff schedules not only because referred to in the contract signed by them but because they had been lawfully filed and published; and in the case of *C., R. I. & P. Ry Co. vs. Cramer*, 233 U. S. 490, this Honorable Court said:

> "That the rule of liability (universal rule established by the Hepburn Act) is to be enforced in the light of the fact that the provisions of the tariff enter into and form a part of the contract of shipment."

Under these decisions, we respectfully submit that the tariffs filed by the Galveston Wharf Company with the Interstate Commerce Commission limiting its liability to loss and damage by negligence became a part of the contract between the parties to this litigation, just as if said limitation of liability had been written into the contract between the parties. If such a limitation had been written into the contract between the parties such a limitation would have been valid.

In the cases of *Cau vs. Texas Pacific Ry Co.*, 194 U. S. 427, and *Arthur vs. T. & P. Ry Co.*, 204 U. S. 506, this Honorable Court held that the contract for service was a sufficient consideration for the limitation of the carrier's liability except for negligence. The cases of Cau and Arthur against the railways cited above were cases involving shipments under bills of lading containing a limitation of the carrier's liability except for negligence, and this Honorable Court held in those cases that the contract of carriage was sufficient consideration for the limitation of liability even though there was no choice of rates offered the shipper. The contract for the services of the Galveston Wharf Com-

pany was sufficient consideration for the limitation of the Wharf Company's liability as contained in the tariff. The principle is the same whether the limitation of the carrier's liability is contained in a tariff which is a part of a switching contract as where the limitation is contained in a contract in the form of a bill of lading.

The fact that the bill of lading, to which the Wharf Company was not a party, does not contain any provision limiting the liability of the carrier therein named to a liability for negligence does not affect the validity of the provision of the contract between the carriers named in the bill of lading and the Wharf Company containing such limitation as evidenced by the tariffs of the Galveston Wharf Company on file with the Interstate Commerce Commission.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the decision of the Supreme Court of Texas should be reviewed and revised by this Court and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Texas and finally reverse it.

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The American Grocery Company adopts the foregoing brief of the Galveston Wharf Company in support of the petition for certiorari.

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